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Supreme Court of the United States

October Term, 1933.

No. 579.

CHARLES ILFELD COMPANY,
Petitioner,

vs.

B. C. HERNANDEZ, Collector of Internal Revenue for the District of New Mexico,
Respondent.

MOTION OF ROBERT H. MONTGOMERY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF *AMICUS CURIAE.*

ROBERT H. MONTGOMERY,
Counsel for The American Tobacco Company as Amicus Curiae.

Of Counsel:
THOMAS G. HAIGHT,
J. MARVIN HAYNES.



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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

MAY IT PLEASE THE COURT:

The undersigned, as counsel for The American Tobacco Company, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae.*

ROBERT H. MONTGOMERY,
Counsel for The American Tobacco Company as Amicus Curiae.

IN THE

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No. 579

CHARLES ILFELD COMPANY,
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vs.

B. C. HERNANDEZ, Collector of Internal Revenue for the District of New Mexico,
Respondent.

BRIEF AS AMICUS CURIAE.

Permission of the Petitioner and of the Respondent first having been obtained, the undersigned attorney respectfully submits the following brief as Amicus Curiae in the above entitled cause.

Preliminary Statement.

This brief will be addressed to the question of law involved in the *second* of the *Specifications of Assigned Errors* set forth in Petitioner's brief at page 9, to wit, whether a parent corporation must reduce the loss sustained upon the liquidation of a subsidiary by the amount of the operating loss of the subsidiary previously reflected in a consolidated return filed for the affiliated group.

The undersigned attorney represents The American Tobacco Company in a case involving a similar question which is now pending before the United States District Court for the Southern District of New York.

ARGUMENT.

I.

A parent corporation is required, upon the sale or liquidation of a subsidiary, to include in its taxable income, the profits arising from such sale or liquidation, even though the said profits have been reflected in a consolidated return.

The foregoing proposition is supported by the decision of the Circuit Court of Appeals for the Second Circuit in *Remington-Rand, Inc.* v. *Commissioner*, 33 F. (2d) 77. The decision apparently has the approval of this Court, because a petition for a writ of certiorari was denied (280 U. S. 591).

In the *Remington-Rand* case it appeared that the operating profits of the subsidiary, though reported as income in the consolidated return, had not been distributed as dividends to the parent (the taxpayer). Apparently, on the theory that these undistributed profits contributed to the enhancement in value of the subsidiary's stock, the taxpayer asserted that unless the amount of the taxable gain was reduced by the amount of the operating profits previously taxed in the consolidated return these operating profits would be taxed twice. The taxpayer's contention failed and the Government's position was sustained. The decision was sound and the principles enunciated by the Court accord in every particular with the principles which the Petitioner asserts are controlling in the instant case.

II.

The statute makes no distinction in its treatment of gains as distinguished from losses.

In all of the income tax laws, gains and losses are governed by the same principles. If an asset is sold or otherwise converted, the difference between its cost and the sales price is profit or loss as the case may be.

The effect of the decision below, taken in connection with the *Remington-Rand* case, is that the entire gain from the liquidation of a subsidiary is to be taxed, while only a part or none of the loss from a liquidation is to be allowed as a deduction.

On facts identical with those presented in the case at bar, in the case of *United Publishers' Corporation* v. *Anderson*, 42 F. (2d) 781, the Government (as it is doing in this case) took a position which was fundamentally inconsistent with that which it had taken in the *Remington-Rand* case. The Government asserted that if the taxpayer's loss upon the sale of the stock of its subsidiary was not reduced in the amount of the subsidiary's operating losses previously deducted in a consolidated return, the *taxpayer* would be given a double deduction. The Government's contention here was just as unsound (and the Court so held) as the taxpayer's contention was in the *Remington-Rand* case, where the taxpayer asserted that unless its profit upon the sale of the stock of its subsidiary was reduced in the

amount of the subsidiary's operating profits previously taxed in a consolidated return the *taxpayer* would be subjected to double taxation.

The Court held in the *United Publishers'* case that the situation presented was the exact converse of that in the *Remington-Rand* case and accordingly held that the loss of the taxpayer should not be reduced in the amount of the operating losses of the subsidiary previously deducted in a consolidated return.

The only theory upon which the loss claimed in the instant case can be disallowed is that the operating losses of the subsidiaries reduced the assets of the subsidiaries (which were in substance the capital assets of the parent) and that a double deduction for the loss of these *capital* assets would therefore result unless the loss realized upon liquidation of the subsidiaries were adjusted for operating losses previously deducted in the consolidated return. Opposed to this theory is the *Remington-Rand* case. The operating profits of the subsidiary which were included from year to year in the consolidated return as income increased the assets of the subsidiary (which on the above theory were in substance the *capital* assets of the parent) *but* the Court in the *Remington-Rand* case *refused* to hold that this was any justification for adjusting the gain realized upon the sale of the stock of the subsidiary by the amount of these operating profits.

CONCLUSION.

It is therefore submitted that the decision below should be reversed.

Respectfully submitted,

ROBERT H. MONTGOMERY,
Counsel for The American Tobacco Company.

Of Counsel:
THOMAS G. HAIGHT,
J. MARVIN HAYNES.

SUPREME COURT OF THE UNITED STATES.

No. 579.—October Term, 1933.

Charles Ilfeld Company, Petitioner,
vs.
B. C. Hernandez, Collector of Internal Revenue for the District of New Mexico.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[April 2, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

In 1917 petitioner purchased all the capital stock of the Springer Trading Company for $40,000 and in 1920 all that of the Roy Trading Company for $50,000. It held these shares until late in 1929 when both companies were dissolved. In that period it advanced the Springer Company sums amounting to $69,030.27, and the Roy Company $9,782.22. Nothing having been paid it on account of these advances, petitioner had an investment in the former of $109,030.27 and in the latter of $59,782.22. It made consolidated returns which took into account the gains and losses of each subsidiary. Operations of the Springer Company resulted in losses in all but two of the years and those of the Roy Company in all but four. The losses of the former exceeded its gains by $118,510.53, and those of the latter by $57,127.85. In 1929, before the end of November, the subsidiaries sold all their property to outside interests. After paying debts to others, each had a balance—the Springer Company, $22,914.22, and the Roy Company, $15,106.16—which it paid petitioner on December 23. Both subsidiaries were dissolved December 30 in that year.

Petitioner made a consolidated return for 1929 based on the results of operation and the liquidation of each subsidiary but made no deduction of losses resulting to itself from the liquidations. The return showed a tax of $20,836.20 which was duly paid. In May, 1931, petitioner filed an amended return and claimed a refund of $14,406.43. This return does not take into account profits or losses of subsidiaries in that year but deducts the losses

above shown to have resulted to petitioner from its investments in them.* The commissioner rejected the claim. Petitioner brought this action in the Federal district court for New Mexico against the collector to recover the amount of its claim. A jury was waived, the court made special findings of fact, stated its conclusions of law and gave petitioner judgment as prayed. The Circuit Court of Appeals reversed. 66 F. (2d) 236. 67 F. (2d) 236.

The question is whether petitioner is entitled to deduct from its 1929 income any part of the losses resulting from its investments in the subsidiaries.

The Revenue Act of 1928 and Regulations 75 made under § 141 (b) govern. Section 141 (a) gives to groups of affiliated corporations the privilege of making consolidated returns, in lieu of separate ones, for 1929 or in subsequent years upon condition that all members consent to the regulations prescribed prior to the return. And, in view of the many difficult problems arising in the administration of earlier provisions authorizing consolidated returns, the Congress deemed it desirable to delegate by § 141 (b) the power "to prescribe regulations legislative in character". Senate Report No. 960, 70th Cong., 1st Sess., p. 15. That subsection authorizes the commissioner, with the approval of the Secretary, to make such regulations as he may deem necessary in order that the tax liability of an affiliated group and of each member "may be determined, computed, assessed, collected, and adjusted in such manner as clearly to reflect the income and to prevent avoidance of tax liability".

The making of the consolidated return constituted acceptance by petitioner and its subsidiaries of the regulations that had been prescribed. No question as to validity is raised. The brief substance of the regulations here involved follows:

Article 37 (a) provides: Gains or losses shall not be recognized upon a distribution *during* a consolidated return period by one member to another in cancelation or redemption of its stock; "and

	Springer Co.	*Roy Co.*	*Combined*
*Operating losses claimed and deducted prior to 1929	$131,424.41	$59,007.25	$190,431.66
Investment loss claimed for 1929	86,116.05	44,676.06	130,792.11
Total losses claimed	217,540.46	103,683.31	321,223.77
Investment (stock plus advances)	109,030.27	59,782.22	168,812.49

any such distribution shall be considered an intercompany transaction". And subdivision (b) requires that any such distribution *after* a consolidated return period shall be treated as a sale, and directs adjustments to be made in accordance with articles 34, 35 and 36.

Article 34 (a) prescribes the basis for determination of gain or loss upon a sale by a member of stock issued by another member and "during any part of the consolidated return period" held by the seller. Subdivision (c) applies to sales which break affiliation and which are made during the period that the selling corporation is a member of the affiliated group.

Article 40 (a) directs that intercompany accounts receivable or other obligations which are the result of intercompany transactions during a consolidated return period shall not "during a consolidated return period" be deducted as bad debts. Subdivision (e) governs deductions after the consolidated return period on account of such transactions during the period.

1. In the absence of a provision in the Act or regulations that fairly may be read to authorize it, the deduction claimed is not allowable. *Brown* v. *Helvering*, — U. S. —, —, —. *Burnet* v. *Houston*, 283 U. S. 223, 227. Cf. *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 326. Petitioner contends that Articles 37 (b) and 34 (c) cover the case. We are unable so to construe them. Article 37 relates to dissolutions. Subdivision (b) deals with distributions made after a consolidated return period. The record conclusively shows that each subsidiary handed over the balance before the dissolution was consummated and during the consolidated return period. Article 34 relates exclusively to the sale of stock. No sale of stock was involved. The parent and subsidiary corporations were the only parties. Neither subsidiary acquired stock of the other or that issued by itself. The petitioner retained all the shares of each and at the end voted dissolutions that operated to cancel them.

2. Respondent, relying on Articles 37 (a) and 40 (a), maintains that the losses petitioner seeks to deduct arose from intercompany transactions during the consolidated return period and therefore may not be allowed.

Article 37 (a) forbids the recognition of losses upon distribution during the consolidated return period and declares that such distributions shall be considered intercompany transactions. Article